

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 EDWARD CARTER, : 07-CV-1215
5 :
6 Plaintiff, :
7 :
8 v. : January 28, 2009
9 :
10 INCORPORATED VILLAGE OF OCEAN : United States Courthouse
11 BEACH, et al., : Central Islip, New York
12 :
13 Defendants. :
14 -----X

15 TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY HEARING
16 BEFORE THE HONORABLE E. THOMAS BOYLE
17 UNITED STATES MAGISTRATE JUDGE
18

19 APPEARANCES:

20 For the Plaintiff: ANDREW S. GOODSTADT, ESQ.
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1 THE CLERK: Calling Case 07-CV-01215, Carter v.
2 Incorporated Village of Ocean Beach.

3 Parties, please state your appearances for the
4 record.

5 MR. GOODSTADT: Andrew Goodstadt of Thompson, Wigdor
6 & Gilly on behalf of plaintiff. Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. NOVIKOFF: On behalf of defendants Village, Ocean
9 Beach Police Department and Mayor Loughlin, former Mayor
10 Rogers, Ken Novikoff from Rivkin, Radler. Good morning, Your
11 Honor.

12 THE COURT: Good morning.

13 MR. MORAN: On behalf of the defendant George Hesse,
14 John Moran from the law offices of Marks, O'Neill, O'Brien &
15 Courtney.

16 MS. GRAY: I'm Roslyn Gray, head counsel for
17 [inaudible].

18 MR. YOUNG: I'm Robert Young, of counsel [inaudible].

19 THE COURT: Ms. Gray, I've seen a lot of district
20 attorneys come into this court and I would say a lot of them
21 don't know what they're doing. You did a very nice job.

22 MS. GRAY: Thank you, Your Honor.

23 THE COURT: All right. Let's take what appears to be
24 a consent application first, that's the easier one to deal with
25 here and it's putting over until after the criminal trial --

1 the deposition of Mr. Hesse? Would anybody like to be heard on
2 that?

3 MR. GOODSTADT: Yes, Your Honor. The only issue that
4 we had put forth in our one page letter was to the extent that
5 the trial doesn't commence or end timely as is currently
6 anticipated and I spoke with Mr. Hesse's counsel and the
7 schedule that we discussed last time we were here still seemed
8 to be in effect. So we don't have a problem assuming it
9 doesn't get pushed off for months and assuming that the Court
10 would entertain discovery issues that arise out of Mr. Hesse's
11 deposition and follow-up discovery despite the fact that the
12 formal discovery deadline is the end of this month.

13 THE COURT: Thank you.

14 MR. MORAN: Your Honor, I would just add that I spoke
15 to Mr. Hesse and his criminal attorney yesterday and they've
16 advised me that they fully expect to -- that jury selection in
17 the criminal matter is to begin on February 23rd and the
18 criminal attorney anticipates that the trial of that action
19 will take approximately two weeks but they expected to go ahead
20 on that date.

21 THE COURT: Okay. So I'll grant it subject to the
22 conditions that you suggested which are only reasonable and
23 that is that discovery will be extended for purposes of Mr.
24 Hesse.

25 Now, do I understand that after the trial he will

1 submit to a deposition?

2 MR. MORAN: Well, Your Honor, Mr. Hesse will submit
3 to a deposition after the trial. He anticipates being
4 acquitted. If he's not acquitted I assume that the decisions
5 regarding what he'll actually testify to would be something
6 that he would discuss with his criminal attorney.

7 THE COURT: All right. You understand -- I mean
8 there's nothing anybody can do about his invoking the Fifth
9 Amendment privilege assuming it's invoked in good faith, that's
10 regardless of whether he's acquitted or convicted but I think
11 what's anticipated here -- at least what I anticipate by
12 granting this temporary stay is that he'll submit to the
13 examination. I don't have any control if he decides to invoke
14 his privilege with regard to particular questions but that
15 would probably be the procedure that would be followed.

16 MR. MORAN: Yes, Your Honor.

17 THE COURT: Okay. So your application is granted and
18 I'll put something in writing that will adopt the conditions
19 and so forth.

20 MR. MORAN: Thank you, Your Honor.

21 MR. GOODSTADT: Thank you, Your Honor.

22 THE COURT: Now, we have the application by the
23 defendants to hold the District Attorney of Suffolk County in
24 contempt.

25 MR. NOVIKOFF: Your Honor, we'll waive that --

1 THE COURT: This is the mouse that roared here.

2 MR. NOVIKOFF: Your Honor, we'll waive that aspect of
3 the motion.

4 THE COURT: Well, I would hope so because it is
5 totally devoid of any and all merit. You're not waiving too
6 much.

7 MR. NOVIKOFF: We'll move on to the -- Your Honor,
8 you're correct, we'll move on to the substantive element of the
9 motion, Your Honor.

10 THE COURT: All right. Would you like to be heard?

11 MR. NOVIKOFF: Yes, Your Honor.

12 May it please the Court, we fully appreciate the
13 assertions of the privileges that are contained in the District
14 Attorney's letter to the Court. We believe, however, that
15 while the assertions or at least one of them has been
16 recognized by the federal court, the other one -- and
17 specifically the public interest privilege -- has not been
18 recognized as binding on this federal court. Nevertheless,
19 other than asserting the privilege and other than a general and
20 conclusory statement that the disclosure of certain documents
21 could impact a future investigation the District Attorney
22 really hasn't articulated the substantial showing that in our
23 opinion is necessary to prevent disclosure of most of the
24 documents that we have sought.

25 They are correct; with regard to any grand jury

1 testimony of non-parties to this action we would have to go to
2 state court and get that so for the purposes of this motion
3 we're not going to seek any order from the Court.

4 THE COURT: Okay.

5 MR. NOVIKOFF: To the extent, however, that any of
6 the five former police officers of Ocean Beach have testified
7 before the grand jury, this is an interesting issue. They are
8 correct that there is a secrecy that is attached to grand jury
9 testimony, however, any witness to a grand jury has the right
10 to request the production of that transcript and they have the
11 right to disclose what their testimony has been.

12 THE COURT: Who told you that?

13 MR. NOVIKOFF: Various New York cases, Your Honor,
14 and I will cite the one that was actually cited --

15 THE COURT: A witness is entitled to his or her grand
16 jury testimony?

17 MR. NOVIKOFF: Yes. They're entitled to disclose
18 their testimony and I will --

19 THE COURT: Is it a case that you've cited or is it
20 something --

21 MR. NOVIKOFF: This is a case that they have cited,
22 actually, it's Melendez v. City of New York, 109 A.D. 213, 1st
23 Dept. 1985.

24 THE COURT: Say it a little bit slower.

25 MR. NOVIKOFF: Sure. 109 A.D. 213, 1st Dept., 1985.

1 I'll read from the opinion that starts, I believe, on
2 Page 7 of the Lexis printout and I'm going to quote, "However,
3 plaintiffs are entitled to immediate disclosure of their own
4 grand jury testimony. The statute, while directing secrecy,
5 expressly provides that a witness is not precluded `from
6 disclosing his own testimony.'"

7 THE COURT: Is this an accused in a criminal
8 prosecution?

9 MR. NOVIKOFF: No. These are the plaintiffs.

10 THE COURT: No, I mean in this case.

11 MR. NOVIKOFF: Right.

12 THE COURT: In other words, if someone is charged
13 with a crime, presumably -- and I'd be glad to hear argument on
14 it -- but, presumably, the prosecutor has an obligation to turn
15 over all the defendant's statements.

16 MR. NOVIKOFF: Yes.

17 THE COURT: Is that what this case stands for?

18 MR. NOVIKOFF: No, this case -- and if I can read the
19 next two sentences?

20 THE COURT: Sure.

21 MR. NOVIKOFF: "It has been held that the principle
22 of confidentiality does not prevent the witness from revealing
23 his testimony before a grand jury. In addition, in civil
24 actions a party has a right to obtain a copy of his own
25 statement which extends to both prior written and recorded

1 statements." This is in the context of grand jury testimony.

2 So while I agree with the concept -- the argument
3 posed by the District Attorney that they don't have the right
4 absent a state court order to disclose the grand jury
5 testimony, the plaintiffs have the ability to get that
6 testimony if they so desire. They can make -- at least
7 according to this and I'd be happy to brief the issue a little
8 bit further -- they have the ability to make the request to the
9 District Attorney and say, please release my grand jury
10 testimony.

11 THE COURT: But as I understand your application you
12 don't just want plaintiff's statements, you want any witness
13 that they may have interviewed including the detectives' notes.

14 MR. NOVIKOFF: That's a separate aspect. I'm
15 focusing on just the pure grand jury testimony because I think
16 that's --

17 THE COURT: That, I understood you to withdraw.

18 MR. NOVIKOFF: Right. For any other witnesses other
19 than the parties in this matter. We're not going to -- unless
20 we want to go to state -- well, let me take a step back. If
21 the plaintiffs testified in front of the grand jury -- the
22 plaintiffs in this action -- we are still seeking through the
23 plaintiffs the production of that.

24 THE COURT: Grand jury testimony?

25 MR. NOVIKOFF: Grand jury testimony. Under Rule 26 I

1 think it would be in their custody, possession and control if
2 all they need to do --

3 THE COURT: Well, I'm going to get rid of that one
4 right now. Go to the state court if you want that.

5 MR. NOVIKOFF: Okay.

6 THE COURT: Along with everything else.

7 MR. NOVIKOFF: Okay. So we're done with the grand
8 jury aspect -- the grand jury testimony. Thank you, Your
9 Honor.

10 With regard to the statements made by Mr. Carter and
11 the audiotapes between Mr. Carter and Mr. Lamm, I believe we
12 are entitled to production of that; (1) according to the
13 affidavit the audiotapes were not even made at the behest of
14 the D.A.

15 THE COURT: Did you ask the plaintiff for it?

16 MR. NOVIKOFF: The plaintiff has produced audiotapes
17 but I don't know if those are the same audiotapes that have
18 been produced.

19 THE COURT: Did you cover this in your deposition?
20 Were these the same audiotapes that you turned over to the
21 District Attorney of Suffolk County? That's a simple question.

22 MR. NOVIKOFF: We were unaware at the time of the
23 deposition that audiotapes had been -- and I'll check the
24 deposition transcripts -- I don't know if I was aware
25 necessarily that there had been audiotape separate and apart

1 from what had been produced to us that had been turned over to
2 the D.A. but perhaps I could inquire with Mr. Goodstadt on that
3 issue.

4 THE COURT: I think you're barking up the wrong tree.

5 They've got a criminal prosecution going here. The
6 case is scheduled for trial at the end of February as we just
7 discussed. They've made the representation by affidavit which
8 is in sharp contrast to your application here for privileged
9 documents by letter motion. Their representation is that they
10 have an ongoing investigation.

11 MR. NOVIKOFF: Yes, Your Honor, and I'll address
12 that.

13 THE COURT: Don't they have a work product privilege?

14 MR. NOVIKOFF: Your Honor, I don't believe that they
15 have shown that this harm that will take place from disclosure
16 of documents that would pre-date -- or disclosure of
17 information pre-dating, certainly, the terminations --

18 THE COURT: Did you ever do any criminal work?

19 MR. NOVIKOFF: No, Your Honor. Should I continue,
20 Your Honor.

21 THE COURT: It's obvious.

22 MR. NOVIKOFF: Your Honor, the indictments of Mr.
23 Hesse took place two years ago. There has been no indictment
24 of anyone else at the Village other than the police officers.
25 To the extent the plaintiffs -- Mr. Carter -- has made a

1 statement, I think we certainly should be entitled to Mr.
2 Carter's statement at a minimum as to what he provided the D.A.
3 I could understand the Court's position with regard to,
4 perhaps, other witnesses but Mr. Carter is a plaintiff in this
5 action and I've seen no harm that has been articulated with
6 regard to the disclosure of Mr. Carter's statement.

7 THE COURT: Okay. You don't now how criminal
8 prosecutions work. You try to get your first conviction and
9 then if you do get that first conviction and that person has
10 something to lose at sentence, then maybe that person decides
11 to do some talking and provide information with regard to other
12 prosecutions. That's the ongoing investigation, I would
13 assume, here.

14 MR. NOVIKOFF: Yes, but Mr. Carter is not from my
15 understanding and, perhaps, I'm misunderstanding --

16 THE COURT: I'm talking about the defendant Hesse.

17 MR. NOVIKOFF: Yes, I'm not looking --

18 THE COURT: You seem to be questioning whether or not
19 they can invoke the law enforcement privilege or work product
20 privilege because the investigation is all over.

21 MR. NOVIKOFF: Well, the investigation as to Mr.
22 Hesse is over because he's been indicted and he was indicted
23 two years ago. The only other investigation that has been
24 articulated by the D.A.'s Office is they're currently
25 investigating the Village of Ocean Beach.

1 THE COURT: Can't they do that?

2 MR. NOVIKOFF: They can but it's been two years, Your
3 Honor, and --

4 THE COURT: It should be narrower.

5 MR. NOVIKOFF: Excuse me?

6 THE COURT: It should be a much narrower
7 investigation?

8 MR. NOVIKOFF: Your Honor, with regard to Mr. Hesse's
9 statements we're not seeking those, it's just Mr. Carter's
10 statement since he is a plaintiff in this action.

11 THE COURT: You asked for any witnesses. I have no
12 idea who they spoke to. Your request is for any and all
13 witnesses.

14 MR. NOVIKOFF: Yes, but we certainly --

15 THE COURT: I assume that Hesse and some of the other
16 defendants were somehow involved in this investigation.

17 MR. NOVIKOFF: I know of no other person other than
18 Hesse that was potentially involved in this investigation but I
19 do know from the D.A.'s affidavit that they have a statement
20 from Mr. Carter, who is a plaintiff in this action. So,
21 certainly, as to Mr. Carter I would think we would be entitled
22 to that statement.

23 THE COURT: Anything else?

24 MR. NOVIKOFF: No, Your Honor. Thank you.

25 THE COURT: All right. Can I hear from the D.A.,

1 please?

2 MS. GRAY: We would assert our privilege simply
3 because this is an ongoing investigation and simply because
4 defendant does not believe that there are other investigations
5 going on does not minimize our interest in maintaining our
6 files and not alerting possible defendants to our
7 investigations.

8 THE COURT: What are the privileges you're asserting?

9 MS. GRAY: We are asserting the law enforcement
10 privilege as well as the confidential informant privilege to
11 protect people who have given us information based on the
12 promise that we will keep their identities secret.

13 THE COURT: Anybody else have an interest in this and
14 want to be heard on this issue?

15 MR. GOODSTADT: Your Honor, we didn't submit a letter
16 because I wasn't positive after doing the research that we had
17 standing to object to the disclosure of this information but,
18 certainly, to the extent that it would impede an investigation
19 into any of the conduct either that Mr. Hesse has already been
20 indicted for or some future potential indictments that are
21 coming down, whether it's related or not to the issues in this
22 case which it reasonably might be, we certainly believe that
23 disclosure would impede the investigation to the extent one is
24 going on. Again, I'm not privy to what they have as you could
25 imagine so I'm not sure exactly what they are protecting but to

1 the statement of my client, I would assume there would be no
2 exclusion and I don't think there's any exclusion to the
3 privilege that I've seen for a party in a civil lawsuit
4 because they're a plaintiff in a civil lawsuit and their
5 testimony would be similarly protected or a statement would be
6 similarly protected by the law enforcement privilege or the
7 confidential informant privilege or work product privilege. To
8 the extent that Mr. Novikoff asked our clients -- and he
9 certainly did -- about meetings, statements, recordings,
10 discussions with anybody representing someone in the District
11 Attorney's Office, we did not instruct our clients not to
12 answer because I don't think we had a basis to make that
13 instruction, I'm not sure it's our privilege --

14 THE COURT: You mean at a deposition?

15 MR. GOODSTADT: Yes, Your Honor.

16 THE COURT: Can you make any representation that may
17 avoid some future motion practice with regard to the videos?
18 Do you know whether the videos that were turned over to the
19 District Attorney of Suffolk County are one in the same as the
20 ones that your clients maintained?

21 MR. GOODSTADT: Your Honor, I certainly can find that
22 out. What I can represent to the Court is that any audio
23 recordings that were in my client's custody, possession or
24 control throughout this litigation have been turned over and I
25 don't have any reason to believe that they're different but

1 they may be. I can ask my clients and find that out.

2 Another representation I can make is I'm not sure if
3 they actually had -- for them to have turned over an audio
4 recording and not been the same, that means I would have had to
5 turn over the original. I know they haven't destroyed any
6 audio recordings. So I would believe that it's probably the
7 same but I can definitely confirm that to avoid a motion.

8 THE COURT: Okay. Mr. Novikoff, anything else you
9 want to --

10 MR. NOVIKOFF: Yes, and I'm not suggesting for a
11 moment that anything has been destroyed or anything has gone
12 on.

13 THE COURT: You have a very hard issue here but
14 because you've raised so many legal issues I'm not going to do
15 anything from the bench but I'll give you something in writing.

16 MR. NOVIKOFF: Thank you, Your Honor.

17 THE COURT: Okay. Is there anything else while we
18 have everybody here that we ought to be talking about as far as
19 a schedule or anything? Everything is going on schedule as far
20 as discovery completion at the end of February, I think, is
21 that right?

22 MR. GOODSTADT: Although we have a pretty packed
23 schedule for depositions in February I think we're going to be
24 able to squeeze everybody in other than for Hesse and to the
25 extent that there are one or two due to scheduling with some

1 third parties that I'm trying to work out some scheduling with
2 maybe it will spill into March but at this point I don't think
3 that that's necessarily going to be the case.

4 THE COURT: Okay. Well, we already know that one
5 deposition will be going over -- and I know you're all working
6 at the case and I know there are a lot of legal issues that
7 have slowed everything down so if you do need more time let me
8 know.

9 MR. GOODSTADT: Appreciate that, Your Honor.

10 MR. NOVIKOFF: Thank you, Your Honor.

11 MR. MORAN: Thank you, Your Honor.

12 THE COURT: Okay. Thanks for coming out under very
13 adverse conditions.

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I certify that the foregoing is a transcript from an electronic sound recording of the proceedings in the above-entitled matter.



CARLA NUTTER

Dated: January 28, 2009